Ismail bin Mohamad v Wan Khairani bt Wan Mahmood and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02(I)-44 OF 2008(W) AND 02(I)-45 OF 2008(W)
ZAKI AZMI CHIEF JUSTICE, ALAUDDIN PCA, HASHIM YUSOFF, MOHD GHAZALI FCJJ AND TENGKU BAHARUDIN SHAH JCA
9 JUNE 2009

Civil Procedure — Injunction — Application for — Injunction to prevent dissipation of company properties pending outcome of divorce proceedings in Shariah Court

Companies and Corporations — Derivative action — Commencement — Company having only two shareholders — Personal benefit obtained by minority shareholder in commencing derivative action — Whether derivative action allowable

Constitutional Law — Courts — Jurisdiction — Shariah Court — Civil court not to decide on matters falling within exclusive jurisdiction of Shariah Court — Action commenced in Shariah Court for 'harta sepencarian' — Whether civil court may entertain derivative action involving company property which may fall within 'harta sepencarian' — Whether any conflict or overlap in jurisdiction — Federal Constitution art 121(1A)

Islamic Law — Divorce — Mutaah and harta sepencarian — Application for harta sepencarian after divorce — Claim for harta sepencarian involving assets subject to litigation in civil court — Whether action in civil court abuse of court's process for reason of duplicity — Whether jurisdiction of civil court ousted — Federal Constitution art 121(1(A)

Islamic Law — Jurisdiction — Shariah Court — Overlapping jurisdictions between Shariah Court and civil court — Whether jurisdiction of civil court ousted — Whether civil court may proceed to try action — Federal Constitution art 121(1(1A)

This case involved a dispute between a divorced Muslim couple as to the distribution of their assets on their divorce. The company in which the husband and wife were shareholders had during the marriage purchased many

pieces of lands. Two lots of these lands were acquired by the government. The proceeds of the compensation to the acquisition were at the request of the husband, as director of the company, paid to him in person and were being held in his personal account in trust for the company. The wife held 7.97% of the shares in the company and was thus a minority shareholder. Since the lands were acquired during their marriage, the wife claimed 50% of it as *harta sepencarian* in the Shariah Court. To protect her interest, the wife had obtained an injunction at the Shariah Court to prevent the husband from dissipating the assets acquired during the marriage before the Shariah Court made a decision on their distribution. The wife at the same time, acting on derivative action on behalf of the company, sought an injunction to protect the company's interest. The Court of Appeal in granting injunction only in respect of the wife's share of the compensation money decided that there was overlapping jurisdiction of the Shariah Court and the civil court. Hence, the wife appealed against the decision granting partial injunction and the husband appealed against the Court of Appeal granting the injunction at all. The questions posed for determination were, inter alia, as follows: (i) where the Shariah Court is determining the status of certain lands for a *harta sepencarian* claim by the plaintiff, whether the civil court could acquire jurisdiction to determine the status of the same lands in an action brought by the same plaintiff; and (ii) whether the bringing of proceedings both in the civil court as well in the Shariah Court amounts to duplicity of proceedings and therefore is an abuse of process of the court. The husband claimed that by virtue of art 121(1A) of the Federal Constitution, the wife cannot apply for the injunction before a civil court because it involved the distribution of assets of a Muslim marriage which was within the jurisdiction of the Shariah Court. According to the husband, since there were only two shareholders in the company, whatever the wife did on behalf of the company was in fact to protect her personal interest.

Held, dismissing Appeal No 02(i)-44 of 2008(W) and allowing Appeal No 02(i)-45 of 2008(W):

(1) Any jurisdiction that is lawfully vested in the Shariah Court is exclusively within the jurisdiction of the Shariah Court. The civil court cannot overstep its jurisdiction to decide on matters which strictly fall within the Shariah Court jurisdiction. But in this case that was not so. The wife was seeking to exercise her right as a minority shareholder and not as a wife. Her motive may be to protect her rights as a wife but that was irrelevant (see para 18).

(2) There cannot be an overlapping jurisdiction between the civil court and the Shariah Court. Neither can there be double proceedings as submitted by the husband. The action in the Shariah Court and the derivative action in the High Court were two separate independent actions although the results may seem to overlap (see para 19).

(3) A derivative action is a derivative action. The number of shareholders is not material, whether there are two or more. A minority shareholder has the right to take a derivative action to protect the interest of a company (see para 20).

(4) In a divorced wife's claim for *harta sepencarian*, at the end of the day, she may be entitled to more than just her registered portion in the company. Therefore, if the court was to limit the injunction to only 7.97% of the monies held in the name of the husband, in effect the court would be deciding that the wife was only entitled to that portion of the monies. The court had no such jurisdiction (see para 22).

[Bahasa Malaysia summary

Kes ini melibatkan pertikaian antara pasangan orang Islam yang bercerai berkaitan pembahagian harta mereka setelah bercerai. Syarikat yang mana suami isteri tersebut merupakan pemegang saham telah membeli beberapa bidang tanah semasa perkahwinan mereka. Dua lot tanah tersebut diambil oleh kerajaan. Wang pampasan ke atas pengambilan itu dibayar kepada suami, atas permintaannya sebagai pengarah syarikat dan dipegang di bawah akaun peribadinya sebagai amanah bagi pihak syarikat. Isteri memegang 7.97% saham dalam syarikat dan maka itu merupakan pemegang saham minoriti. Memandangkan tanah tersebut diambil semasa perkahwinan mereka, isteri menuntut 50% sebagai harta sepencarian di Mahkamah Syariah. Untuk melindungi kepentingannya, isteri memperoleh injunksi di Mahkamah Syariah untuk menghalang suami melesapkan aset-aset yang diperolehi semasa perkahwinan sebelum Mahkamah Syariah membuat keputusan tentang bahagian masing-masing. Isteri, pada masa yang sama, bertindak atas tindakan terbitan bagi pihak syarikat, memohon injunksi untuk melindungi kepentingan syarikat. Mahkamah Rayuan, dalam memberikan injunksi hanya ke atas bahagian isteri daripada wang pampasan itu memutuskan bahawa terdapat bidang kuasa bertindan antara Mahkamah Syariah dan mahkamah sivil. Oleh itu, isteri merayu terhadap keputusan memberikan injunksi separa dan suami merayu terhadap Mahkamah Rayuan yang memberikan injunksi tersebut. Persoalan-persoalan yang dikemukakan untuk diputuskan ialah, antara lain, seperti berikut: (i) apabila Mahkamah Syariah menentukan status beberapa tanah untuk tuntutan harta sepencarian oleh plaintif, sama ada mahkamah sivil boleh mendapat bidang kuasa untuk menentukan status tanah-tanah yang sama dalam tindakan yang dibawa oleh plaintif yang sama; dan (ii) sama ada membawa prosiding ke mahkamah sivil dan Mahkamah Syariah merupakan kependuaan prosiding dan oleh itu menyalahgunakan proses mahkamah. Suami mendakwa bahawa berikutan perkara 121(1A) Perlembagaan Persekutuan, isteri tidak boleh memohon injunksi di hadapan mahkamah sivil kerana melibatkan pembahagian aset-aset perkahwinan orang Islam yang mana merupakan bidang kuasa Mahkamah Syariah. Menurut suami, memandangkan hanya terdapat dua pemegang saham dalam syarikat

tersebut, apa sahaja yang dilakukan oleh isteri bagi pihak syarikat adalah untuk melindungi kepentingan peribadinya.

Diputuskan, menolak Rayuan No 02(i)-44 Tahun 2008(W) dan membenarkan Rayuan No 02(i)-45 Tahun 2008(W):

(1) Apa-apa bidang kuasa yang diberikan secara sah kepada Mahkamah Syariah adalah khusus dalam bidang kuasa Mahkamah Syariah. Mahkamah sivil tidak boleh melampaui bidang kuasa itu untuk memutuskan perkara-perkara yang jelas terangkum dalam bidang kuasa Mahkamah Syariah. Tetapi, dalam kes ini, bukanlah sebegitu. Isteri memohon untuk melaksanakan haknya sebagai pemegang saham minoriti dan bukannya sebagai isteri. Motifnya mungkin untuk melindungi haknya sebagai seorang isteri tetapi itu tidak relevan (lihat perenggan 18).

(2) Tidak boleh berlaku pertindihan bidang kuasa antara mahkamah sivil dan Mahkamah Syariah. Begitu juga tidak boleh berlakunya prosiding berganda seperti yang dinyatakan suami. Tindakan di Mahkamah Syariah dan tindakan terbitan di Mahkamah Tinggi merupakan dua tindakan berbeza dan tersendiri walaupun keputusannya mungkin kelihatan bertindan (lihat perenggan 19).

(3) Tindakan terbitan adalah tindakan terbitan. Bilangan pemegang saham tidak penting, sama ada terdapat dua atau lebih. Pemegang saham minoriti berhak mengambil tindakan terbitan untuk melindungi kepentingan syarikat (lihat perenggan 20).

(4) Dalam tuntutan isteri yang diceraikan bagi harta sepencarian, pada akhirnya, dia mungkin berhak ke atas bahagian yang melebihi bahagian yang didaftarkan di dalam syarikat. Oleh itu, jika mahkamah menghadkan injunksi tersebut kepada 7.97% daripada jumlah wang yang dipegang atas nama suami, dengan ini mahkamah sepertinya memutuskan bahawa isteri hanya berhak ke atas bahagian tersebut. Mahkamah tiada bidang kuasa sebegitu (lihat perenggan 22).]

Notes

For cases on application for injunction, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3141–3171.

For cases on derivative action generally, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 125–142.

For cases on jurisdiction, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1967–1987.

For cases on mutaah and *harta sepencarian*, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 526–528.

For cases on Shariah Court, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 574–610.

Cases referred to

Foss v Harbottle (1843) 2 Hare 461 (refd)

Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib [1992] 2 MLJ 793, SC (refd)

Salijah bte Ab Latef v Mohd Irwan bin Abdullah Teo [1996] 2 SLR 201, CA (refd)

Wan Khairani binti Wan Mahmood v Ismail bin Mohamad & Anor [2008] 1 MLJ 164; [2007] 6 CLJ 582, CA (refd)

Legislation referred to

Federal Constitution art 121(1A)

Cyrus Das (Abdul Rashid Ismail, Megat Abdul Munir, Alan Wong and Andrew Heng with him) (Khalek Awang) for the appellant.

Sulaiman Abdullah (PY Chong with him) (Nordin Torji & Partners) for the respondent.

Zaki Azmi Chief Justice:

[1] This case involves a dispute between a divorced Muslim couple as to the distribution of their assets on their divorce. They applied for leave to appeal to this court, pertaining to the order of the Court of Appeal granting the injunction to prevent the husband (the appellant in Civil Appeal No 02(i)-44 of 2008(W) and the first respondent in Civil Appeal No 02(i)-45 of 2008(W)) from dissipating the monies held by him which is equivalent to the wife's (the respondent in Civil Appeal No 02(i)-44 of 2008(W) and the appellant in Civil Appeal No 02(i)-45 of 2008(W)) share in the company (the second respondent in Civil Appeal No 02(i)-45 of 2008(W)). She holds 7.97% of shares in the company.

[2] On 16 February 2009 this court heard the appeals from both parties against that decision; the wife against granting partial injunction and the husband against the Court of Appeal granting the injunction at all.

[3] Due to the urgency of the matter, we delivered our decision on 24 February 2009, dismissing Appeal No 02(i)-44 of 2008(W) and allowing Appeal No 02(i)-45 of 2008(W). In other words, injunction was granted to the wife restraining the husband from utilising 100% of the monies held by him in trust for the company. We now give our reasons.

[4] To protect her interest, the wife had obtained an injunction at the Shariah Court in 1992. The injunctive relief from the Shariah Court was against the husband to protect her claim for *harta sepencarian*.

[5] The background of the dispute is that the company of which the husband and the wife were shareholders had during the marriage purchased many pieces of lands. As mentioned earlier, the wife is a minority shareholder. Two lots of these lands were acquired by the government.

[6] The proceeds of the compensation to the acquisition were at the request of the husband, as director of the company, paid to him in person. The monies are now held in his personal account in trust for the company. This is admitted by the husband.

[7] The wife contended that since the lands were acquired during their marriage, she is claiming 50% of it as *harta sepencarian* in the Shariah Court. Her likelihood of success in that court is not our concern at this juncture. The question which we have answered is whether the husband should be prevented from disposing any part of the proceeds.

[8] More detailed facts of this case can be found in the grounds of judgment of the Court of Appeal in *Wan Khairani binti Wan Mahmood v Ismail bin Mohamad & Anor* [2008] 1 MLJ 164; [2007] 6 CLJ 582.

[9] The wife at the same time, acting on derivative action on behalf of a company, sought an injunction to protect the company's interest. What is a derivative action is quite well settled but will be briefly explained later in this judgment.

[10] The injunction at the Shariah Court on the other hand is to prevent the husband from dissipating the assets acquired during the marriage before the Shariah Court makes a decision on their distribution. The injunction at the civil court is to await the decision of the High Court on the declaration that the land (and now the compensation monies paid as a result of acquisition of the lands allegedly belonging to the company) belongs to the company.

[11] However, the Court of Appeal in granting injunction only in respect of the wife's share of the compensation money decided that there was overlapping jurisdiction of the Shariah Court and the civil court. According to the Court of Appeal, it has to be either within the Shariah Court or within the civil court. Here, there are two separate parties, one, the wife and the other the company to which the wife is a shareholder.

[12] It is important to note that at the application for leave to this appeal, both parties agreed or consented that the following questions mentioned below be referred to this court. There was no argument heard as to whether leave

should be allowed or not. I was a member of the panel that granted leave. The agreed questions were:

(a) Where the Shariah Court is determining the status of certain lands for a *harta sepencarian* claim ('the Shariah action') by the plaintiff, whether the civil court could, on the basis of exercising overlapping jurisdiction, acquire jurisdiction to determine the status of the same lands in an action brought by the same plaintiff ('the civil action').

(b) Whether when put on notice to discontinue the Shariah action in view of the civil action, nevertheless the plaintiff actively pursued the Shariah action by amending the claim and applying from injunction orders thereunder, it should be regarded that the plaintiff has elected thereby to pursue the Shariah action in place of the civil action?

(c) Whether it is an abuse of process for the plaintiff to simultaneously maintain two actions over the same lands in two different courts wherein the claims and the causes of action in respect of the lands are inconsistent with each other?

(d) Whether the bringing of proceedings both in the civil court as well in the Shariah Court amounts to duplicity of proceedings and therefore is an abuse of process of court.

(e) In a derivative action for recovery of company assets allegedly misappropriated by the majority shareholder, can the court divide the said assets according to the equity ratio of the shareholders and preserve by interim injunction only that part of the assets representing the equity ratio of the shareholder bringing the derivative action?

[13] The husband's argument is that by virtue of art 121(1A) of the Federal Constitution, the wife cannot apply for the injunction before a civil court because it involves the distribution of assets of a Muslim marriage which is within the jurisdiction of the Shariah Court. Alternatively, the wife must elect whether to proceed in the Shariah Court or the civil courts. She cannot apply for injunctions in both courts.

[14] According to the husband, since there are only two shareholders in the company, whatever the wife does on behalf of the company is in fact to protect her personal interest.

[15] The wife's reply is simple. She says that in the Shariah Court, she is applying as the wife but in the civil court, she is applying as a minority shareholder in or as representative of the company. In other words, it is the company which is applying for the declaration. She is merely acting on behalf of the company to protect the company's assets. Therefore, the question of conflict of or overlapping jurisdiction does not arise.

[16] The husband's argument is that since the wife had obtained an injunction at the Shariah Court against 100% of the assets including the proceeds of the sale of the two subject lands, the wife cannot at the same time obtain another injunction in the civil courts in respect of the same amount. According to his counsel, this would be in breach of art 121(1A). He cited several authorities to say that the jurisdiction or orders made by the Shariah Court is exclusive. He says that once the matter falls within the Shariah jurisdiction, she cannot at the same time, simultaneously obtain a similar order from the civil courts.

[17] I would agree to this submission had both the injunctions been obtained by the wife in her personal capacity. Instead, we find as a matter of fact that the injunction in the civil court was sought by the company. If that is so, on the facts and issues in this appeal, those authorities cited by the husband cannot be relevant to this appeal. As to the argument that the final beneficiary to both injunctions is in fact the wife, we do not think this matters.

[18] It is not denied that any jurisdiction that is lawfully vested in the Shariah Court is exclusively within the jurisdiction of the Shariah Court. It is also admitted that the civil court cannot overstep its jurisdiction to decide on matters which strictly fall within the Shariah Court jurisdiction (see *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793 and *Salijah bte Ab Latef v Mohd Irwan bin Abdullah Teo* [1996] 2 SLR 201). But in this case that is not so. The wife is seeking to exercise her right as a minority shareholder and not as a wife. Her motive may be to protect her rights as a wife but that is irrelevant. One must view her application as one by a shareholder. It does not prevent her from doing so. It is not denied that if she had not filed an action to claim *harta sepencarian* in the Shariah Court, the objection to her filing the derivative action may not arise.

[19] In my opinion, there is a fallacy in the Court of Appeal judgment that there is an overlapping jurisdiction or 'assisting jurisdiction'. There cannot be an overlapping jurisdiction between the civil court and the Shariah Court. Neither can there be double proceedings as submitted by the husband. On the facts of this case, the action in the Shariah Court and the derivative action in the High Court are two separate independent actions although the results may seem to overlap. Therefore questions (a), (b), (c) and (d) of para 12 above are answered in the negative because there is no overlapping jurisdiction resulting in no question of the party having to elect the same and therefore there was no abuse of process of the court.

[20] In my opinion, a derivative action is a derivative action. The number of shareholders is not material, whether there are two or more. A minority shareholder has the right to take a derivative action to protect the interest of a company.

[21] In a derivative action, the action is brought for and on behalf of the company for the company's benefit. Derivative action is one taken by a shareholder to protect his or her interest in the company. Since the action cannot be taken by a shareholder (by virtue of *Foss v Harbottle* (1843) 2 Hare 461) he/she has to name the company as a party. The wife is therefore protecting her interest in the company as a shareholder and not as a wife.

[22] Should she be successful at the Shariah Court to more than the value proportionate to her registered number of shares in the company, then the monies now held by her husband as trustee for the company can be paid to her. In a divorced wife's claim for *harta sepencarian*, at the end of the day, she may be entitled to more than just her registered portion in the company. Therefore, if we are to limit the injunction to only 7.97% of the monies now held in the name of the husband, in effect this court would already be deciding that the wife is only entitled to that portion of the monies. This court has no such jurisdiction. As to her rights in the Shariah Court, I would not like to make any comments. It is left to the relevant forum to decide.

[23] The facts remain that the husband held the lands in trust for the beneficiary (ie the company by virtue of an express trust deed dated 21 January 1986) and the derivative action is an action for the benefit of the company. Therefore, with regard to question (e) of para 12 above, the injunction is granted to prevent the husband from dissipating all the monies held by the husband in trust for the company.

[24] The order is therefore as mentioned in para 3 of these grounds of judgment.

[25] My learned brother judges Alauddin Dato' Mohd Sheriff PCA, Hashim Dato' Hj Yusoff FCJ, Mohd Ghazali Mohd Yusoff FCJ and Tengku Baharudin Shah Tengku Mahmud JCA have read through this judgment in draft and concurred with it.

Appeal No 02(i)-44 of 2008(W) allowed and Appeal No 02(i)-45 of 2008(W) dismissed.

Reported by Kanesh Sundrum